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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CESAR OMAR PAZ, Defendant and Appellant.	B213477 (Los Angeles County Super. Ct. No. PA059616)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General for Plaintiff and Respondent.

PROCEDURAL BACKGROUND

On December 4, 2007, an information was filed charging appellant Cesar Omar Paz and Byron Nathaniel Longmire in count 1with sodomy by acting in concert with force (Pen. Code[1], § 286, subd. (d)), and in count 2 with sexual penetration with a foreign object (§ 289, subd. (a)(1)).[2] Appellant pleaded not guilty.[3]

On September 22, 2008, a jury found appellant guilty of sodomy by acting in concert with force (count 1), and not guilty of sexual penetration with a foreign object (count 2). The trial court sentenced appellant to a term of 7 years in prison.

FACTUAL BACKGROUND

A. *Prosecution Evidence*

In July 2007, 48-year old Steven W. lived in a licensed group home supervised by the North Los Angeles County Regional Center. The home had six other "client" residents, including appellant and Longmire. Steven and the other client residents of the home suffered from developmental disabilities. Oladipo Williams, who provided care to the residents, also lived in the home.

The key incident underlying the charges against appellant occurred on July 18, 2007.[4] Regarding the incident, Steven testified as follows: At approximately

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1 All further statutory citations are to the Penal Code, unless otherwise indicated.

2 The information also alleged under both counts that appellant and Longmire had inflicted great bodily injury (§ 12022.8). The trial court struck the allegations as to appellant during his trial.

3 After appellant's and Longmire's trials were severed, Longmire entered a plea of guilty prior to appellant's trial. Longmire is not a party to this appeal.

4 Steven stated that the incident occurred on July 23, 2007. This date appears to be erroneous, as Oladipo Williams testified that Steven first reported the incident to him on
(Fn. continued on next page.)

12:30 a.m., appellant and Longmire entered Steven's bedroom, where he was trying to sleep. They removed Steven's clothes, and appellant punched him on the face. According to Steven, the punch caused him to bleed on his pillow case. Steven did not hit or push them, as he was fearful that resistance on his part would get him into trouble with the Regional Center or police. While appellant laughed, Longmire inserted his penis into Steven's anus, moved it around, and hit Steven on the face. After Longmire removed his penis, appellant left the room momentarily and returned with a plastic spoon, which appellant and Longmire inserted into Steven's anus.[5] When they finished, they laughed. As they left Steven's room, they said, "You tell anyone, and we are going to kick your ass." Two or three days later, Steven reported the incident to Oladipo Williams.

Steven also testified that before or after the incident, he signed a document that stated: "Steven will pay back Cesar or Byron [$]100 and Cesar $20."[6] Steven denied that he owed appellant or Longmire money, and asserted that they owed him $120. He also denied that the debt was related to the July incident.

According to Oladipo Williams, on the day following the incident, he found a condom wrapper on the floor of Steven's room, and noticed that Steven's pillow case was missing. When Williams asked about the wrapper, Steven told him that "everything was okay," but he later noticed that Steven hovered unusually near him during their daily activities. Steven eventually told Williams that appellant and Longmire had forced him to have sex with them. Williams and his supervisor spoke to Longmire, who stated that he and appellant "both forcefully made Steve []

July 22, 2007, and that the incident occurred several days earlier, on July 18, 2007.

[5] Although Steven initially testified that appellant and Longmire had inserted the spoon into his anus, Steven later stated that only Longmire did so.

[6] Steven later denied that he signed the document.

have sex with them." When Williams met with appellant and told him about Longmire's statement, appellant said that he was "in cahoots with [] Longmire." Longmire and appellant also told Williams that they had thrown Steven's pillow case in the trash. Williams notified the police, who questioned Longmire and appellant. According to Williams, appellant displayed the document regarding Steven's debt and told the officers that Steven had consented to his and Longmire's sexual activity.[7]

Steven was taken to a hospital, where injuries were found on his anus. In investigating the incident, Los Angeles Police Department Detective John Doerbecker interviewed appellant. A recording of the interview was played for the jury. Appellant initially told Doerbecker that when Longmire said he wanted to have sex with Steven, appellant thought that Longmire was "just playing around." Appellant helped Longmire remove Steven's clothes, handed Longmire a condom, and initially stood back, although at some point he held Steven down. Appellant was surprised when Longmire "actually went and did it," that is, had anal sex with Steven. According to appellant, Steven laughed throughout the incident, and said at one point that he liked it. When appellant cautioned Longmire that he might be sent back to jail for violating his probation conditions, Longmire said, "Oh well, I don't care." Longmire eventually said to Steven, "Oh, you better not tell nobody, . . . or I'm gonna beat your ass." Later in the interview, appellant told Doerbecker that Steven and Longmire had some sort of contract for sex, and that Steven's participation in the sex was voluntary. According to appellant, Steven asked him

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[7] Los Angeles Police Department Officer Craig Kojima testified that when he arrived at the group home, he spoke to appellant, who said that he had participated in what he believed was a "joke" on Steven.

to help remove his clothes. Appellant also denied that he had engaged in any sexual activity with Steven.

B. *Defense Evidence*

Appellant testified on his own behalf. According to appellant, Steven owed money to Longmire and himself. On July 18, 2007, appellant prepared the document regarding the debt, and Steven signed it. Later that day, Longmire drank some beer and became drunk. Longmire told Steven that he would cancel Steven's debt if Steven had sex with him. Steven agreed. Longmire and Steven went to Steven's room, where appellant joined them. Appellant did not believe that they would carry out the agreement. At Steven's request, appellant helped remove Steven's pants. He tapped Steven on the shoulder and asked him, "Are you gay?" When Longmire began to have sex with Steven, appellant left the room. Steven laughed during the sexual activity. Appellant did not see Longmire insert a spoon into Steven's anus. He also denied that he told Williams that he helped Longmire in forcing Steven to have sex.

Los Angeles Police Department Detective Katherine Haskins testified that when she interviewed Steven, he said that during the incident, appellant entered the kitchen and returned with an item that Steven did not see. Steven further stated that "it was rough, felt like rubber, and seemed like something you would find in a kitchen."

Frank Griggs, a coordinator for the North Los Angeles County Regional Center, testified that Steven often made complaints about the group home, including that residents in the group home were stealing his property. When Griggs investigated the complaints, he usually concluded that there was insufficient evidence to substantiate them.

C. *Rebuttal*

Steven denied that he agreed to have sex with Longmire in exchange for a cancellation of his debt. He asserted that appellant and Longmire raped him.

DISCUSSION

Appellant contends that the trial court erred in admitting Williams's testimony regarding a statement by Longmire that Williams related to appellant. In addition, appellant contends that there was instructional error.

A. *Williams's Testimony*

Appellant contends that the trial court erroneously admitted Williams's statement to appellant regarding Longmire's account of the incident. Williams testified that he told appellant what Longmire had said to him about the incident, namely, that Longmire and appellant "both forcefully made Steve [] have sex with them." According to Williams, appellant responded that he was "in cahoots" with Longmire. Appellant argues that admission of Longmire's remark to Williams (as related to appellant by Williams) contravened the Confrontation Clause of the Sixth Amendment of the United States Constitution and the principles established in *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. U.S.* (1968) 391 U.S. 123 (*Bruton*). In addition, he argues that the remark was inadmissible hearsay. We reject these contentions. As explained below, under the circumstances, the remark was admissible to establish an adoptive admission, and its admission violated neither the *Aranda*/*Bruton* rule nor the Confrontation Clause.

Under Evidence Code section 1221, "'[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other

conduct manifested his adoption or his belief in its truth.' [Citation.] The statute contemplates either explicit acceptance of another's statement or acquiescence in its truth by silence or equivocal or evasive conduct. 'There are only two requirements for the introduction of adoptive admissions: "(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his *adoption* of, or his *belief in*, the truth of such hearsay statement." [Citation.]' [Citation.]" (*People v. Combs* (2004) 34 Cal.4th 821, 842-843.)[8]

1. *Underlying Proceedings*

During Williams's testimony, the prosecutor asked what Longmire told Williams and his supervisor when they inquired about Steven's reported sexual assault. In response to an objection from appellant, the trial court conducted a bench conference on the proposed testimony. The prosecutor made the following offer of proof: Williams was prepared to testify that after Longmire told Williams and the supervisor that he had sex with Steven against his will, Williams reported Longmire's remark to appellant, who said "he also was involved in it." The trial court declined to admit Longmire's remarks to Williams as declarations against penal interest, reasoning that Longmire was available as a witness (Evid. Code, § 1230). The court ruled that Williams would be permitted to testify only that Longmire said "something" to him that caused him to interview appellant.

When Williams's testimony resumed, he stated that when he confronted

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8 In criminal actions, the rule is subject to an additional requirement, namely, that the defendant's silence in the face of accusatory statements is not attributable to his constitutional privilege against self-incrimination. (*People v. Combs*, *supra*, 34 Cal.4th at p. 843.) Appellant does not suggest that this exception is applicable here.

appellant, he told him that Longmire had "already explained everything." According to Williams, appellant answered that "he was in cahoots with [] Longmire."[9] Over appellant's objection, the trial court permitted Williams to *further* testify that appellant made this response after Williams had told appellant that "Longmire admitted that they both forcefully made Steve [] have sex with them." The trial court reasoned that the additional testimony was admissible under Evidence Code section 356, which in some circumstances permits the admission of portions of a conversation "necessary to make [a remark] understood."[10] The court stated: "[The remark is] not necessarily coming in for the truth of the matter asserted. It's just what was told to [Williams] by Longmire, which [Williams] repeated to [appellant] which then triggered . . . a response from [appellant]."

2. *Analysis*

We conclude that Williams's testimony was admissible to establish an adoptive admission by appellant.[11] Under Evidence Code section 1221, when a defendant expressly concedes the truth of statements regarding a crime made by a

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9 Williams later clarified that appellant did not use the word "cahoots" when he responded to Williams. According to Williams, appellant said: "I did it. I was there."

10 Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

11 Although the trial court admitted the testimony under Evidence Code section 356, rather than under Evidence Code section 1221, "[w]hen evidence is properly received the basis for the court's ruling is not material. [Citations.]" (*People v. Williams* (1988) 44 Cal.3d 883, 911.)

codefendant, both the codefendant's statements and the defendant's acknowledgment of their truth are admissible against the defendant. (*People v. Combs, supra,* 34 Cal.4th at pp. 840-841.) "The analytical basis for this [rule] is that the adopting party makes the statement his own by admitting its truth. The statement or conduct of the adopting party thus expresses the same statement made by the declarant." (*People v. Castille* (2005) 129 Cal.App.4th 863, 876 (*Castille*).) The statements that trigger the defendant's response are not admitted for their truth, but to establish the content of the defendant's admission. (*Combs,* at p. 842.) Accordingly, "since adoptive admissions are in effect the defendant's own admissions, no concerns arise about the credibility or veracity of the original declarant." (*People v. Zavala* (2008) 168 Cal.App.4th 772, 780.)

An instructive application of these principles is found in *Castille*. There, a police officer conducted a joint interview with three defendants charged with murder. (*People v. Castille, supra,* 129 Cal.App.4th at pp. 868-875.) During the interview, each defendant described the murder, and made statements about his co-defendants' roles in the crime. (*Ibid.*) The codefendants responded to these statements by confirming their truth. (*Id*. at pp. 874-875, 881.) The appellate court held that the initial statements and the confirmations of their truth were admissible as adoptive admissions against the defendants who made the confirmations. (*Id*. at pp. 875-881.) We reach the same conclusion here. The trial court admitted Williams's testimony about Longmire's remarks to him solely to establish the content of defendant's own admission. We see no error in the ruling.[12]

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12 We recognize that although the trial court instructed the jury regarding adoptive admissions (CALCRIM No. 357), it did not expressly inform the jury that Longmire's statement to Williams was admitted solely to establish the content of appellant's admission. However, as appellant failed to request a limiting instruction of this kind, he forfeited any contention of error predicated on the absence of such an instruction.
(Fn. continued on next page.)

Appellant contends that the admission of Williams's testimony contravened his rights under the *Aranda*/*Bruton* rule. We disagree. As Longmire's trial had been severed from appellant's, the rule was not violated. (*Combs*, *supra*, 34 Cal.4th at p. 841.)

Appellant also contends that the admission of Williams's testimony violated his rights under the Confrontation Clause. In *Combs*, our Supreme Court rejected a similar contention on facts resembling those before us. (*Comb*s, *supra*, 34 Cal.4th at p. 842.) There, the defendant and his codefendant were charged with murder. (*Id*. at p. 821.) When a police detective asked them to reenact the crime, the co-defendant made statements implicating the defendant, which the defendant adopted by his words and conduct. (*Id*. at p. 844.) On appeal, the defendant contended that the admission of the codefendant's statements contravened his confrontation rights.

Our Supreme Court found no error. Noting that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted" (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9), our Supreme Court stated: "[The codefendant's] statements incriminating defendant were not admitted for purposes of establishing the truth of the matter asserted, but were admitted to supply meaning to defendant's conduct or silence in the face of [the] accusatory statements. [Citations.] . . . . [¶] . . . . [¶] Thus, because [the codefendant's] statements were admitted for a nonhearsay purpose, defendant's Sixth Amendment right was not implicated. [Citations.]" (*Combs*, *supra*, 34 Cal.4th at pp. 842-844.) The same is true here. In sum, Williams's testimony regarding Longmire's remarks to him were properly admitted.

(*People v. Silva* (1988) 45 Cal.3d 604, 625; *People v. Preston* (1973) 9 Cal.3d 308, 315-316.)

B. *Instructional Error*

We turn to appellant's contentions regarding instructional error. He argues that the trial court misinstructed the jury regarding the so-called "*Mayberry* defense" (*People v. Mayberry* (1975) 15 Cal.3d 143, 153-158 (*Mayberry*)). In addition, he maintains that the jury received defective "awareness of guilt" instructions. We disagree.[13]

1. *Mayberry Defense Instructions*

We begin with appellant's contention regarding the *Mayberry* defense instruction. In *Mayberry*, a defendant was charged with rape by means of force and threat, kidnapping and other offenses. (*Mayberry*, *supra*, 15 Cal.3d at pp. 146-147.) At trial, the prosecution presented evidence that the defendant compelled the victim to come to his apartment and have sexual intercourse with him. (*Id*. at pp. 147-149.) The defendant testified that the victim's conduct throughout the incident was voluntary. (*Id*. at p. 149.) He requested a special instruction that directed the jury to acquit him of rape and kidnapping if the jury had a reasonable doubt as to whether he "reasonably and genuinely believed that [the alleged victim] freely consented to her movement [to the apartment] and to sexual intercourse with him." (*Id*. at p. 153.) The trial court declined to so instruct the

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13 At the threshold, respondent argues that appellant forfeited his contentions by failing to raise them before the trial court. However, a defendant need not assert an objection to preserve a contention of instructional error when the error affects the defendant's "substantial rights." (§ 1259.) In this regard, "[t]he cases equate 'substantial rights' with reversible error" under the test stated in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) Here, appellant contends that the purported instructional errors implicate his substantial rights. We address his contention on the merits to determine whether there was an impairment of his substantial rights. (See *People v. Anderson* (2007) 152 Cal.App.4th 919, 927.)

jury. In ruling that this was error, our Supreme Court stated: "If a defendant entertains a reasonable and bona fide belief that [the alleged victim] voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite . . . to a conviction of either kidnapping [] or rape by means of force or threat []." (*Id*. at p. 155.)

As our Supreme Court has subsequently explained, "[t]he *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. [Citations.]" (*People v. Williams* (1992) 4 Cal.4th 354, 360-361, fn. omitted.)

Even when the defendant asserts that the victim expressly consented to sexual activity, the trial court must give a *Mayberry* defense instruction sua sponte if there is evidence that the victim's other conduct reasonably led the defendant to believe that there was consent. In *People v. May* (1989) 213 Cal.App.3d 118, 122-123, the defendant was charged with forcible oral copulation and assault with intent to commit rape. At trial, the victim testified that she met the defendant in a bar. (*Ibid*.) She accompanied him to his apartment, where he compelled her to engage in sexual activity. (*Ibid*.) The defendant testified that after the victim flirted with him in a bar she asked for $50 in exchange for sex. (*Id.* p. 123.) He

agreed. (*Ibid*.) They engaged in sexual activity, but he was unable to achieve an erection. (*Ibid*.) When she asked for $20, he punched her. (*Id.* at p. 124.)

Although the defendant relied on the theory that the victim had expressly consented to the sexual activity, the appellate court held that the evidence regarding the initial flirtation obliged the trial court to instruct on the *Mayberry* defense. (*People v. May*, *supra*, 213 Cal.App.3d at p. 125.) The court stated: "[I]f the only evidence from the defendant is unequivocal consent and from the victim nonconsensual forcible sex, a sua sponte *Mayberry* instruction is not required. [Citations.] However, where the record contains 'some evidence of equivocal conduct by the victim which led [the defendant] to reasonably believe that there was consent where in fact there was none,' the instruction should be given." (*Ibid.*, quoting *People v. Romero* (1985) 171 Cal.App.3d 1149, 1156.)

Here, the trial court complied with this duty. The jury was instructed with a modified version of CALCRIM No. 1030, which described the elements of sodomy by acting in concert with force, and provided in pertinent part: "The defendant is not guilty of forcible sodomy if he[] actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty."**14**

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14 CALCRIM No. 1030, as provided to the jury, stated: "To prove that the defendant is guilty of the crime of sodomy in concert with Byron Longmire[,] the People must prove that:

1. The defendant aided and abetted a person (Byron Longmire) who committed an act of sodomy with another person ([] Steven W.);

2. The other person ([] Steven W.) did not consent to the act;

AND

(Fn. continued on next page.)

Appellant contends that this *Mayberry* defense instruction was inadequate because it failed to explain the relationship between an actual and reasonable belief in the victim's consent and the lack of criminal intent. He points to the *Mayberry* defense instruction in CALJIC No. 10.65, which addresses this relationship. After explaining that forcible sodomy requires "criminal intent," CALJIC No. 10.65 states in pertinent part: "There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sodomy. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge. If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at

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3. The act was accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to [] Steven W.

Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. Ejaculation is not required.

In order to consent, a person must act freely and voluntarily and know the nature of the act.

An act is accomplished by force if a person uses enough physical force to overcome the other person's will.

Duress means a direct or implied threat of force, violence, danger, hardship, or retribution that causes a reasonable person to do or submit to something that he or she would not otherwise do or submit to. When deciding whether the act was accomplished by duress, consider all the circumstances, including the age of the other person and []his[] relationship to the defendant.

Menace means a threat, statement, or act showing an intent to injure someone.

An act is accomplished by fear if the other person is actually and reasonably afraid or he or she is actually but unreasonably afraid and the defendant knows of his or her fear and takes advantage of it.

The defendant is not guilty of forcible sodomy if []he[] actually and reasonably believed that the other person consented to the act. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty."

the time of the accused sexual activity, you must find him not guilty of the crime."[15]

We discern no inadequacy in CALCRIM No. 1030. The instruction at issue in *Mayberry* was substantially similar to CALCRIM No. 1030. CALCRIM No. 1030 explains the two components of the *Mayberry* defense, as it states that a defendant is "not guilty of forcible sodomy if he *actually* and *reasonably believed* that the other person consented to the act." (Italics added.) In addition, it directs the jury to find the defendant not guilty if the prosecution fails to prove beyond a reasonable doubt that the defendant lacked this state of mind.

As CALCRIM No. 1030 correctly states the general principles related to the *Mayberry* defense, appellant was obliged to request a special amplifying instruction if he desired one. (*People v. Lewis* (2001) 26 Cal.4th 334, 380.) His failure to do so forfeited any contention of error predicated on the absence of such an instruction. In sum, the jury was properly instructed with CALCRIM No. 1030.

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15 CALJIC No. 10.65 states in full: "In the crime of unlawful [forcible rape] [oral copulation by force and threats] [forcible sodomy] [penetration of the [genital] [or] [anal] opening by a foreign object, substance, instrument or device by force, [violence] [fear] [or] [threats to retaliate], criminal intent must exist at the time of the commission of the [_____].

"There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] [oral copulation] [sodomy] [or] [penetration of the [genital] [anal] opening by a foreign object, substance, instrument, or device]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge[.] [, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity.]

"[However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another is not a reasonable good faith belief.]

(Fn. continued on next page.)

2. *Awareness of Guilt Instructions*

Appellant contends that the jury was improperly instructed with CALCRIM Nos. 362 and 371. As provided to the jury, CALCRIM No. 362 stated: "If the defendant [] made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show []he[] was aware of []his[] guilt of the crime and you may consider it in determining []his[] guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." As provided to the jury, CALCRIM No. 371 stated: "If the defendant tried to hide evidence against []him[], that conduct may show that []he[] was aware of []his[] guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

The focus of appellant's challenge to these instructions is the phrase "aware of his guilt." He notes that CALJIC Nos. 2.03 and 2.06, the predecessors of CALCRIM Nos. 362 and 371, use the phrase "consciousness of guilt," which appellant maintains is different in significance.[16] He argues that the phrase "aware

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"If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find [him] [her] not guilty of the crime."

16 CALJIC No. 2.03 states: "If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

CALJIC No. 2.06 states: "If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing

(Fn. continued on next page.)

of his guilt" carries the implication that the defendant is guilty as charged, whereas the phrase "consciousness of guilt" is a vague term suggesting only that the defendant "has some notion that certain evidence could be incriminating in some respect." Appellant maintains that the use of the phrase "awareness of his guilt" in CALCRIM Nos. 362 and 371 impermissibly lowers the prosecution's burden of proof and denies due process.

In *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1157-1159 (*Hernandez Rios*), the appellate court rejected a similar contention. There, the trial court instructed the jury with a version of CALCRIM No. 372, which stated: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." (*Hernandez Rios*, at p. 1158.) On appeal, the defendant contended that this instruction impermissibly presumed his guilt and lowered the prosecution's burden of proof. (*Id*. at pp. 1157-1158.) Following an etymological analysis, the appellate court determined that the terms "'conscious'" and "'aware'" are equivalent in meaning for purposes of a "consciousness of guilt" instruction. (*Id*. at pp. 1158-1159.)

Appellant contends that *Hernandez Rios* was wrongly decided, asserting that the phrases "consciousness of guilt" and "awareness of his guilt" are different in meaning. He maintains that "[a] person could have a vague generalized consciousness of guilt, akin to a guilty conscience, without having a specific awareness of his guilt in a particular matter." Appellant thus argues that CALCRIM Nos. 362 and 371 improperly direct the jury's attention to inferences

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evidence] [by], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

that support a determination of guilt.

We conclude that the purported differences in meaning between the two phrases do not render CALCRIM Nos. 362 and 371 defective. In *People v. Mendoza* (2000) 24 Cal.4th 130, 180 (*Mendoza*), our Supreme Court addressed CALJIC No. 2.52, which states that the defendant's flight after a crime "is a fact which . . . may be considered . . . in deciding whether a defendant is guilty or not guilty."[17] Although CALJIC No. 2.52 uses *no* phrase describing the defendant's state of mind, the court characterized it as a "consciousness of guilt" instruction, and determined that it comported with due process. The court stated: "'A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. . . . A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury. [Citation.]' [Citations.] This test permits a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a consciousness of guilt. Thus, here the flight instruction does not violate due process." (*Mendoza*, at p. 180, quoting *Francis v. Franklin* (1985) 471 U.S. 307, 314-315.) The court also concluded that CALJIC No. 2.52 neither directs the jury to make an inference of guilt nor lessens the burden of proof. (*Mendoza*, at pp. 180-181.)

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17 CALJIC No. 2.52 states in full: "The [flight] [attempted flight] [escape] [attempted escape] [from custody] of a person [immediately] after the commission of a crime, or after [he] [she] is accused of a crime, is not sufficient in itself to establish [his] [her] guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding whether a defendant is guilty or not guilty. The weight to which this circumstance is entitled is a matter for you to decide."

In view of *Mendoza*, the precise characterization of a "consciousness of guilt" within a "consciousness of guilt" instruction is not crucial to the adequacy of the instruction, as CALJIC No. 2.52 contains *no* such characterization. Rather, the features of a "consciousness of guilt" instruction central to its adequacy are those discussed in *Mendoza*. Here, the permissive inferences identified in CALCRIM Nos. 362 and 371, like that identified in CALJIC No. 2.52, comport with due process under the test stated in *Mendoza*: the inference that a defendant's false statements or suppression of evidence may show an "awareness of his guilt" violates neither reason nor common sense. (*Mendoza, supra*, 24 Cal.4th at p. 180.) CALCRIM Nos. 362 and 371, like CALJIC No. 2.52, otherwise leave the inferences to be drawn from the defendant's conduct to the jury, and direct the jury not to rely exclusively on this conduct to establish guilt. We therefore see no defect in them.

Appellant also suggests that the instructions were improperly given because he and Steven suffer from developmental disabilities. He argues that "[p]eople with mental disabilities think and act differently." We see no error in the instructions regarding this matter. The jury heard testimony from Steven and appellant, as well as testimony regarding their disabilities from other witnesses. The instructions informed the jury that it was free to determine the "meaning and importance" of appellant's statements and conduct in light of this evidence. In sum, the jury was properly instructed with CALCRIM Nos. 362 and 371.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.